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In the

Supreme Court of the United States

October Term, 1948

No. 224

CHARLES E. AUSTIN, INC., Petitioner,

v.

HARRY F. KELLY, Secretary of State of the State of Michigan.

On application for certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

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INDEX

		Page
I	Opinion of the Court Below	1
II	Counter-Statement on Jurisdiction	2
III	Counter-Statement of Facts	5
IV	Argument	9
V	Conclusion	17

Authorities Cited:

Austin v. Secretary of State, 321 Mich. 426 6

Carson Petroleum Company v. Vial, 279 U.S. 95, 73 L. Ed. 626 ..... 4, 9, 10, 14

Empresa Siderurgica, S. A. et al v. Merced County, et al, 194 P (2d) 527 4

Jett Bros. Distilling Co. v. City of Carrollton, 252 U.S. 1 12

Joy Oil Co., Ltd. v. State Tax Commission, 321 Mich. 335 6

Monamotor Oil Company v. Johnson, 292 U.S. 86 16

Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69, 91 L. Ed. 80 ..... 4, 14

Page

Spaulding & Bros. v. William H. Edwards, Collector of Internal Revenue, 262 U.S. 67, 67 L. Ed. 865.....4, 9, 14

Waters-Pierce Oil v. State of Texas, 212 U.S. 86..... 6, 13

Wilson v. Cook, Commissioner of Revenue, 327 U.S. 474, at p. 482 12

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I.

Opinion of the Court Below.

Opinion of the court below (436) is officially reported as Chas. E. Austin, Inc. vs Harry F. Kelly, Secretary of State, 321 Mich. 426.

The companion case, involving practically the same questions, October Term, 1948, No. 223, is reported as Joy Oil Company v. State Tax Commission, 321 Mich. 335.

II.

Counter-Statement on Jurisdiction

Petitioner invokes the jurisdiction of this Court under Sec. 237 of the Judicial Code, as amended, (Title 28 U.S. C.A. Sec. 344(a), 8 F.C.A., Title 28, Sec. 344(a)); and he claims that the judgment appealed is a final judgment; that its application is made within the time limit prescribed by the rules of this court and presents a Federal question in this case in that it assesses a tax under the gasoline tax law of Michigan on gasoline, a commodity in foreign commerce, by holding that the interruption of the journey in foreign commerce by storing of the gasoline in tanks at Dearborn, Michigan, at the end of the rail journey pending transshipment by boat to Canada, rendered the commodity subject to tax under the Michigan Gasoline Tax Act, and therefore contravenes the Constitution of the United States and is probably not in accord with applicable decisions of this court.

It is the position of Respondent:

(1) That the Michigan Supreme Court did not decide a federal question of substance:

(a) When the gasoline was received in the State of Michigan, it was received under such conditions that the petitioner itself did not know which, or how much of each shipment would be exported; the election to export or retain the gasoline in Michigan being made from four to six months after the gasoline had arrived at Dearborn, Michigan, and petitioner had been afforded sufficient time to determine from its sales in each country what part of the total shipments (cov-

ered by Bills of Lading which consigned the gasoline to Dearborn, Michigan, but which bills of lading bore the legend "for export") would be needed by petitioner's Canadian bulk plant and Canadian retail stations, and what part would be needed for its Michigan bulk plant and retail stations, which stood in the name of Margaret P. Austin individually, all of which were operated as a unit under identical ownership, though bearing different corporate names.

(b) That the petitioner did not ship the gasoline with the good faith intention of exporting it, but attempted to use the protection of the commerce clause of the United States Constitution to cloak its scheme of state tax evasion;

(c) That the gasoline did not become a commodity in foreign commerce until it was taken from petitioner's bulk plant at the place of consignment, (Dearborn, Michigan), where it was stored in a common storage, from which were supplied both Canadian bulk plant and retail stations, and Michigan retail stations; and that immediately upon removal from the Dearborn bulk plant and placement into a boat or vehicle bound for a foreign port or location, the petitioner received a refund or a credit for the full amount of the tax collected from or debited against the petitioner;

(d) That the question set forth in the application of the petitioner, (it having admitted that it has been repaid or credited with the full amount of tax per gallon levied by the Michigan Gasoline Tax Act, [3c], for each and every gallon of gasoline which it could show it had actually loaded into a boat or vehicle bound for a foreign port or location from a common storage

tank) is a question only of whether or not it has accounted to the State for all of the gasoline received into storage facilities at its Dearborn plant, as is required by Sec. 8 of Act No. 150 of the Public Acts of 1937, as amended. This being a question of fact, the decision is exclusively within the province of the Michigan Supreme Court.

(2) That if a Federal question could be said to have been involved, such question was decided fully in accord with, among other applicable U.S. Supreme Court cases,

Carson Petroleum Company vs. Vial, 279 U. S. 95, 73 L. Ed. 626;

Richfield Oil Corporation vs. State Board of Equalization, 329 U.S. 69, 91 L. Ed. 80;

A. G. Spaulding & Bros. vs. William H. Edwards, Collector of Internal Revenue, 262 U. S. 67, 67 L. Ed. 865,

in that the facts in the last cited, as well as other like cases, all show that there was no probability that any of the goods stored would be diverted to domestic trade channels, and that the storage at the point of transshipment was not for the convenience and benefit of the shippers, and that the point of transshipment and equipment at that point were solely for the speedy and continuous export of the products abroad, and for no other purpose.

And in the recent case of *Empresa Siderurgica, S. A. et al., v. Merced County et al.,* (June 15, 1948) 194 P. (2d) 527, the Supreme Court of California expertly distinguishes the decisions of this Court dealing with the export clause of the Federal Constitution. Syllabus 3 of the decision in a nutshell states the rule. It is there said:

"The determining factor as to whether goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction and to taxation in the usual way is not the owner's intention to export, but whether or not exportation has commenced."

In the instant case the facts clearly show that petitioner's entire arrangement was one of commingling an amount of gasoline previously purchased in quantity estimated to be in excess of export requirements, and designated, on transit documents, as "for export" with a quantity of gasoline admittedly purchased for domestic trade, and later, when the exact export requirements were determinable, filling these export requirements from the commingling stock and selling the balance to the domestic trade, and meanwhile using the claimed export stock as a "pool" from which the petitioner could recover his actual evaporation and handling losses in the admittedly tax paid domestic stock, thereby evading a portion of the State Gasoline Tax. In short, using one composite stock in trade at Dearborn, Michigan, for the supply of the retail trade of the Joy Oil Company, Ltd., in Toronto and Windsor, Canada, areas—Chas. E. Austin, Inc., in the Detroit area—retail stations of Margaret P. Austin in the Detroit area—at such times and in such amounts as the various retail trade areas would absorb it.

III.

Counter-Statement of Facts

Since the function of this court *"is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights,"* * * *"nor does this*

court sit to review the findings of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court," *(Waters-Pierce Oil Co. vs. State of Texas,* 212 U. S. 86, at page 97), we cannot accept the "Brief Statement of Facts" as set forth in Plaintiff's Petition for Writ of Certiorari. Respondent, therefore, sets forth the following statement of the case, based upon findings of fact of the Michigan Supreme Court, in *C. E. Austin Inc., vs. Secretary of State,* 321 Mich. 426, and "further detailed facts" set forth in *Joy Oil Co., Ltd., vs. State Tax Comm.,* 321 Mich. 335, and incorporated in *Austin vs. Secretary of State* (supra) by reference, (see page 431 *Austin vs. Secretary of State,* (supra).)

The facts, so far as material to the issues before this Court, and as found by the Court below:

The petitioner, Chas E. Austin, Inc., conducted the business of a licensed wholesale distributor of gasoline at Dearborn, Michigan. (437)

The Joy Oil Company, Ltd., is a corporation organized under Canadian law; has a bulk plant and retail stations in Canada (302) and is not authorized to do business in Michigan. (438)

Margaret P. Austin individually owns a number of retail gasoline filling stations in Detroit, which obtain their gasoline supplies from Chas. E. Austin, Inc. (442)

Margaret P. Austin, the wife of Chas. E. Austin, so far as the record shows owns all of the foregoing properties. (437) (438) (442)

This combine maintains involved interlocking corporate and individual and intercorporate leasing arrangements and channels of supply conceived and carried on for the purpose of evading payment of taxes. (442) Gasoline was purchased in the name of the Joy Oil Company, Ltd., in Michigan and outside of Michigan (438) and consigned to Joy Oil Company, Detroit, Michigan, c/o Chas. E. Austin, Inc. (58) (441). On arrival at Dearborn, Michigan, the gasoline supposedly destined for Canada was not only commingled with gasoline to be sold to the retail trade in Michigan, but a large amount of the exportable gasoline was itself diverted to the retail use in Michigan. (441) The gasoline received at the tanks in the Chas. E. Austin plant was commingled as suited the convenience of Margaret P. Austin, the Joy Oil Company, Ltd., and Chas. E. Austin, Inc. (439) (440)

Except that it was for the convenience and benefit of the petitioner to commingle the gasoline for transshipment with tax-liable gasoline, the tax-exempt gasoline would doubtless have been stored separately, and thus have avoided the confusion brought about by the manner in which the gasoline storage was handled. (440) All of the gasoline which was withdrawn from the commingled stocks of gasoline and transshipped to Canada was considered tax exempt by the Defendant, Secretary of State, and so far as was reasonably possible, refunds of the tax previously paid were made. (440)

The Respondent, Secretary of State, made an audit of petitioner's records for the period of September 1, 1939 to October 31, 1940 (437) and deeming the gasoline purportedly destined for Canada not to have been in interstate or foreign commerce under the conditions previously set out, assessed the tax provided by the Gasoline Tax Act as of the date of receipt, and credited the petitioner with the tax on

the date of shipment, when petitioner disclosed by his report that he had shipped the gasoline to Canada. (440)

Petitioner filed reports and paid the tax shown to be due by its reports. (437) The tax in issue here is the difference in taxable gallons between the report of the petitioner and the determination of the State Auditor. (Ex. 37A) (385) Exhibit 37A, shown on page 385 of the record, shows a difference in taxable gallons of 197,815, but does not segregate the incidents of difference into differences involved in petitioner's petition to this court and those not so involved. The auditor's testimony (222 to 240) details these differences.

Two undisputed facts stand out in this case: FIRST, that each gallon of gasoline here in question was taxed in the amount prescribed by the statute upon its receipt into petitioner's storage tanks, from which it also supplied Detroit retail filling stations. (222 to 240) (442) SECOND, as set out in the opinion of the lower court (440) the tax on every gallon actually transshipped to Canada was refunded so far as "reasonably possible". (440)

The amount here in question is of course that part of the total number of gallons of gasoline received as purported property of the Joy Oil Company, Ltd., which was not accounted for by showing it to have been exported or still in the possession of the petitioner. (295)

IV.

ARGUMENT.

Had petitioner not confused the gasoline here in question with its domestic stocks, and had the petitioner transshipped it to Canada under circumstances showing *that no portion of it was used or consumed in the United States (Richfield Oil Co. vs. State Board of Equalization,* 329 U.S. 69, at page 71,) *and that the facilities at the waterside were constructed for the purpose of export operations and the only business conducted there was the unloading of oil from the railroad tank cars into storage tanks and loading the oil from the storage tanks aboard the tankers for shipment abroad, (Carson Petroleum Co. vs. Vial,* 279 U.S. 95, at page 99,) or *if the very act * * * that incurred the tax * * * committed the goods to the carrier that was to take them across the sea, (A. G. Spaulding & Bros. vs. Edwards,* 262 U.S. 66, at page 69,) then the petitioner could very well rely on *Carson Petroleum Co. vs. Vial, Richfield Oil Co. vs. State Board of Equalization, A. G. Spaulding & Bros. vs. Edwards,* supra), but the facts as found by the Supreme Court of Michigan in the instant case are diametrically opposite those of the last cited cases.

In the instant case, the act of placing the gasoline in the hands of the carrier which was to take it abroad did not incur the tax as in the *Spaulding case* (supra) but on the contrary occasioned *the refund* of the tax assessed when the goods were placed in the ordinary domestic bulk plant of the petitioner.

Directly contrary to the facts in the *Richfield case* (supra), the gasoline in the instant case was not deposited in facilities built especially for export trade, and through which no

domestic operations were carried on, but was placed in facilities constructed for ordinary domestic trade and there commingled for the convenience and benefit of petitioner (440) with gasoline from which petitioner serviced its Michigan retail trade and a portion of the exportable gasoline being sold in the domestic retail trade. (440) (441)

In the instant case, the elements constituting the turning point of the *Carson Petroleum Co. vs. Vial,* (supra) are lacking—there *no oil was sold at St. Rose except what was exported. The only business conducted there was the unloading of the oil from tank cars into accumulating tanks and loading the oil from those tanks to tank steamers and the facilities were single purpose export facilities.* The court in *Carson Petroleum Co. vs. Vial,* 279 U.S. 95, at page 99, calls the tanks "storage tanks", but a review of the facts plainly shows that the tanks were not used for storage tanks in the true sense of the word, but were used only for the purpose of accumulating boat shipments. In the instant case the gasoline was deposited in tanks commingled with the purported export stock at the convenience of the foreign and domestic arms of petitioner's combine; some was sold in the Michigan retail trade; some was withdrawn for transshipment to Canada. (440; 441) In the *Carson Petroleum Co. v. Vial* case (supra) there were no complicated interlocking individual and corporate ownership and leasing arrangements conceived and carried on for the purpose of evading the payment of state taxes. (442)

Even if we accept petitioner's statement of facts, an ordinary reading would raise the question in the reader's mind: What is he asking this court to do? A close analysis, however, reveals that what he is actually asking this court to do is to set aside the determination of the lower court, wherein it holds that as far as is "reasonable possible" the

Secretary of State made refunds to the petitioner of the tax on all gasoline actually transshipped to Canada, and redetermine the involved factual situation which the petitioner alone brought about by its commingling of all of its gasoline, as the Michigan Supreme Court pointed out in its opinion as follows (440):

> "• • • Except that it was for the convenience and benefit of the plaintiff, by commingling the gasoline for transshipment with tax-liable gasoline, the tax-exempt gasoline would doubtless have been stored separately, and thus have avoided the confusion brought about by the manner in which the gasoline storage was handled."

From the last paragraph on page 7 of plaintiff's petition and his reference to the record on page 262, we find that petitioner expects this court to order the respondent arbitrarily to assume that there had been an evaporation loss of three percent (3%) of the total number of gallons during the time between original receipt of the gasoline and transshipment to Canada, and to give the petitioner credit for the actual number of gallons transshipped to Canada, plus three percent (3%) of that number. No doubt some evaporation occurred, but the exact amount of such evaporation could not be determined unless the gasoline to be exported were kept separate until the time of its transshipment to Canada. Certainly it could not have been determined while lying commingled with domestic stocks of gasoline (441) and while withdrawals from the commingled mass were being made from time to time to fill orders from the Michigan retail trade. (440)

Wherein was a Federal question of substance decided? Even if we should take the ridiculous position that the facts in the petitioner's case are parallel to the facts in the three

cases he relies upon, the opinion of the lower court specifically recognizes and follows the Export-Import Clauses of the United States Constitution. (440) The Michigan Gasoline Tax Act likewise recognizes these clauses. (Sec. 20 of Act No. 150, P. A. 1927, as amended, reads as follows: "Neither this act, nor any of its provisions, shall apply to foreign or interstate commerce".) The proper administrative officer of the state recognized it when refunds of tax were made. (440) The fact that this court might have made a different decision, as to the amount of gasoline unaccounted for than did the lower court, is immaterial. In *Jett Bros. Distilling Co. vs. City of Carrollton*, 252 U. S. 1, the court holds at page 6:

> "In order to give this court jurisdiction by writ of error under amended Sec. 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority upon a claim that it is repugnant to the Federal Constitution, treaties, or laws so as to require the state court to decide the question of validity in disposing of the contention. • • • "

This holding was specifically followed in *Warren W. Wilson vs. Otho A. Cook, Comm. of Rev.*, 327 U.S. 474, at page 482:

> " • • • 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis' of an appeal. *Jett Bros. Distilling Co. v. Carrollton*, 252 US 1, 6, 64 L ed 421, 423, 40 S Ct

255. It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment, *Jett Bros. Distilling Co. v. Carrollton*, 252 US 1, • • • ".

In *Waters-Pierce Oil Co. vs. Texas*, 212 U.S. 86, at page 97 the court says:

"The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many aspects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to reexamine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the State.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby v. Boyd*, 128 U.S. 488; *Egan v. Hart*, 165 U.S. 188; *Dower v. Richards*, 151 U.S. 658; *Thayer v. Spratt*, 189 U.S. 346. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review

to questions of a Federal nature which we deem to be properly made in this record and essential to "the decision of the case."

In two of the cases relied upon by the petitioner, to-wit: *Richfield Oil Corporation vs. State Board of Equalization,* 329 U.S. 69, 91 L. Ed. 80; *A. G. Spaulding & Bros. vs. William H. Edwards, Collector of Internal Revenue,* 262 U.S. 67, 67 L. Ed. 865, the taxing statute itself was attached as being repugnant to the Export-Import Clauses of the Federal Constitution, and the question of the amount of tax under an admittedly constitutional statute, which is the real question in the case at bar, was not in issue.

In *Carson Petroleum Co. vs. Vial,* 279 U.S. 95, 73 L. Ed. 626, the question arose under a rather unique statute, (Act No. 170 of the Louisiana Public Acts of 1898), which assumed to tax all property of any nature, not previously exempted by law, on an ad valorem basis. The tax on the property involved was laid on an estimated average value for the taxable year. The difficulty of ascertaining the exact nature of the tax was avoided by reason of the fact that the parties had apparently agreed that the only question in the case was whether or not any tax at all could be collected, and that result would depend on whether or not the levy of the tax was an interference with interstate and foreign commerce.

Petitioner, on page 16 of its brief, argues for the application of the maxim "de minimis non curat lex" in the question of its commingling operations setting forth that the total gallonage involved is 1,975,402 and the tax complained of was laid upon a gallonage of only 60,000. It must be borne in mind that the 60,000 gallons do not represent the total amount of gallons commingled, but do represent mere-

ly the number of gallons which the petitioner could not account for when the state auditors were endeavoring to reconcile the confusion caused by petitioner's commingling operations. If the maximum "de minimis non curate lex" should control the decision of this court in this case, then the petitioner has "argued itself right out of court". There can be no question that if the maxim should be applied to a question which is controlling in the entire controversy, there are more, or at least, equally, compelling reasons for its application to the controversy as a whole. This being true, the respondent's purpose here has been accomplished, since that officer endeavors to show that this court is not concerned with the controversy in this cause and that the decision of the Michigan Supreme Court should be regarded as final.

Respondent is of the belief that it would be of no material assistance to this court to show in detail the manner in which the purported export shipments of gasoline were used to evade payment of the Michigan Gasoline Tax, and that it is sufficient to point out that the theory employed is the same as that set forth in the opinion of the lower court (443), from which it readily appears that the pivot point of the evasion scheme is to have on hand *at all times* a quantity of tax-exempt gasoline, out of which evaporation and handling losses in tax-paid gasoline may be recovered, and though it would be impossible to determine the exact point at which the unaccounted for gasoline was lost, it is safe assumption that most of the loss was occasioned by the replenishment of the depleted tax-paid domestic portion of the commingled stock from the purported tax-exempt foreign commerce shipments.

Petitioner does not clearly disclose in his brief exactly how he believes the respondent should have treated ship-

ments of gasoline consigned to Detroit under bills of lading bearing the legend "for export" but his real contention can be found between the lines; that contention being that so long as he sets up certain artificialities which would give the transaction the complexion of an export operation, it must be regarded as a sort of "sacred cow" and the state authorities must follow a strictly "hands off" policy with respect to it and, therefore, no showing of what became of the amount of gasoline actually received at petitioner's domestic plant could be required of it and petitioner could go merrily on replacing losses in his tax-paid domestic stocks from the tax-exempt export stocks without fear of detection. This was the real contention in many cases prior to *Monamotor Oil Company v. Johnson*, 292 U.S. 86, as well as in that case. There the principal question was whether or not an interstate commerce transaction was being taxed by the levy of a tax upon receipt of the goods and refund of the tax upon exportation of the same goods, and the court held that the commerce was not burdened and certainly the holding applies with equal force whether the commerce is interstate or foreign. So far as the questions involved in the instant case are concerned, the Iowa statute in the Monamotor case and the Michigan statute are nearly identical.

V

CONCLUSION

From the above we believe it clearly appears that a Federal question of substance is not involved here, but that in the event this court might hold that the facts do present such question, it was decided by the lower court completely in harmony with the decisions of this court, and the Petition for Certiorari should be denied.

Respectfully submitted,

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